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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

EDDIE SAMUEL IVORY, CHARLES JOHNSON, EDMOND DUHARD, BEN CHANEY, BLAIR SMITH, GEORGE HELLER, ROBERT J. BUTLER and JAMES RUTLEDGE,

Appellants,

v.

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS: PAUL MURCHEK, DIRECTOR, FLORIDA PAROLE AND PROBATION COMMISSION,

Appellees.

On Appeal from the Supreme Court of Florida

Brief in Opposition to Motion to Dismiss or Affirm

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Appellees.

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I

ARGUMENT

A. SUMMARY OF ARGUMENT

As can be plainly seen from reading the summary of the proceedings below, the Plaintiffs raised the requisite substantial federal questions: first, in the pro se complaint seeking injunctive and declaratory relief from the Florida trial court; and second, on appeal to the Florida Supreme Court. Accordingly,

the Supreme Court of Florida necessarily reached its decision after considering the substantial federal questions raised by the Appellants.

B. THE APPELLANTS RAISED THEIR SUBSTANTIAL FEDERAL QUESTIONS TO THE FLORIDA SUPREME COURT, THUS INVOKING JURISDICTION OF THIS COURT TO HEAR THIS APPEAL.

This Court's jurisdiction is invoked by the Appellants Pursuant to 28 U.S.C. §1257(2). Stanton v. Stanton, 421 U.S. 7 (1975); Duren v. Missouri, 99 S. Ct. 664 (1979); Orr v. Orr, 99 S. Ct. 1102 (1979).

The Appellees contend that the Appellants asserted only that Florida Statute §944.485 was unconstitutional under the Florida Constitution as a deprivation of procedural due process and a violation of ex post facto protections. Motion of Appellee at 11-13. As support of this proposition, the Appellees cite to the Appellants' brief before the Florida Supreme Court and in doing so, ignore pertinent parts of the record below.

In support of their contention that the statute violates only the Florida Constitution prohibition against ex post facto laws, the Appellee pointed to the Appellants' brief saying, "the only mention of the Federal Constitution is in the single citation: 'See ... Article I, Section 9, United States Constitution.'" Motion of Appellee at 13. First, the Appellee ignores the proposition for which the United States Constitution is cited. Because the Appellant stated that the Florida Statute violated the "Constitutional (emphasis added) prohibition against ex post facto laws," it is clear that the Appellants' contention was not restricted to the Florida Constitution. Motion of Appellee at A32. Second, the Appellee ignores Appellants' citation to federal case law as authority that Florida Statutes §944.485 violated the

federal constitution prohibition against ex post facto laws. Motion of Appellee at A33-34. Finally, the most sinful omission in the Appellees' motion is evidenced by their failure to consider the Appellants' notice of supplemental authority. Although the Appellees included this notice in the appendix of their motion, they ignored its existence to bolster their argument. The Appellants' supplemental authority clearly states that it adds to the "claim that the act violates the ex post facto prohibitions of the state and federal constitutions." (emphasis added). Motion of Appellee at A56. Accordingly, since the Appellants' supplemental authority is part of the argument, the Appellants specifically raised the federal ex post facto question to the Florida Supreme Court.

The Appellee repeats the mistake contending that the Appellants claimed only that the statute violated the Florida Constitutional procedural due process guarantee. The Appellee said that the Appellants merely "cite [d] to the Fourteenth Amendment to the United States Constitution in the body of the brief, as well as the four federal cases discussing procedural due process." Motion of the Appellee at 14. In reality, the Appellants stated plainly that the Florida Statute "violates the Fourteenth Amendment of the Constitution of the United States (emphasis added) and Article I, Section 9, of the Constitution of the State of Florida." Motion of Appellee at A36. Additionally, the Appellees again ignored the Appellants' supplemental authority. The Appellants' supplemental authority not only cited additional federal case law but reiterated that the cases prove that the statute violates the procedural protection of the Fourteenth Amendment. Motion of Appellee A57-59.

The Appellee then contends that the Appellants' "issues of law" regarding ex post facto and due process protection referred

only to the Florida Constitution. Motion of Appellee at 10-11, 18-19. This Court has never required, however, that federal questions raised be stated specifically as "issues of law".

To the contrary, this Court instead mandates substance over form. In Green Bay & Mississippi Canal Company v. Patten Paper Company, 172 U.S. 58, 66 (1898) this Court said no particular form of words or phrases is necessary to raise the federal question; instead it is sufficient if it appears from the record that such rights were especially claimed in the state court in such manner as to bring it to the attention of that court. In Murray v. Charleston, 96 U.S. 432, 441 (1878) the Court held that its jurisdiction was not to be avoided by the mere absence of express reference to some provision of the federal constitution; that the form and mode in which the federal question was raised in the state court is of minor importance. (emphasis added). And this Court has held that the record must show "affirmatively or by fair implication (emphasis added), that some federal question was involved." Boughton v. American Exchange National Bank, 104 U.S. 427 (1881). In New York ex rel Bryant v. Zimmerman, 278 U.S. 63, 67 (1928), the Court held that jurisdiction can arise if the record as a whole shows either expressly or by clear implication (emphasis added) that the federal claim was adequately presented in the state system.

Applying the law to the instant case, it is obvious that although the Appellants did not specifically allege violation of ex post facto and procedural due process federal constitutional rights in the titles of their arguments in the brief before the Florida Supreme Court, this Court has never required such specificity. Accordingly, the Appellants' clear statements in the body of their brief that Florida Statute §944.485 violated their federal constitutional guarantee against ex post facto laws or

due process violations, exceeded this Court's requirements for raising the requisite federal questions.

The Appellee also contends that the Appellants did not properly raise the federal questions to the Florida Supreme Court in accordance with Florida procedural law. Motion of Appellee at 10-11. The Appellee cites Webb v. Webb, 49 U.S.L.W. 4500, 4501 n.4 (May 18, 1981), Beck v. Washington, 326 U.S. 541, 549-54 (1962), and Bailey v. Anderson, 326 U.S. 203, 206-07 (1945), for the proposition that this Court will look to state procedural rules mandating the form in which questions must be raised and presented to state courts to determine if the federal questions were properly presented. Motion of the Appellee at 10-11. The Appellee, of course, neglected to mention the exception to that rule: the requirement that the question be raised in accordance with state practice is inapplicable where the state court actually entertained the question and decided it.

For example, in Raley v. Ohio, 360 U.S. 423, 436 (1959) this Court said: "There can be no question as to the proper presentation of the federal claim when the highest state court passes on it." See Orr v. Orr, 440 U.S. 260, 274-75 (1979); Harlin v. Missouri, 439 U.S. 459 (1979); Jenkins v. Georgia, 418 U.S. 153, 157 (1974) (when the state supreme court decides a constitutional issue, it is properly before the United States Supreme Court even though the Appellant did not raise the issue in the state appeal.)

Accordingly, while not conceding that the Appellant did not raise the federal question in accordance with Florida Appellate rules, this Court has made it clear that compliance with state appellate rules is unnecessary when the highest state court's decision is based on the federal question.

In the case at bar, it is evident that the federal question

was necessarily involved in the decision by the Florida Supreme Court: First, the Florida Supreme Court cited both federal and state case law in their decision. Ivory v. Wainwright, 393 So.2d 542, 544 (1980). As discussed infra, pages 7-9,the citations to federal case law shows the reliance on the federal constitution, and the citations to Florida case law all track backwards to the federal case law. Second, when it appears that the Florida Supreme Court's decision was based on federal and state grounds and the state grounds are insufficient to sustain judgment, this Court has assumed jurisdiction.[1] See Johnson v. Risk, 137 U.S. 300 (1890); Abie State Bank v. Bryan, 282 U.S. 765 (1931). In Williams v. Kaiser, 323 U.S. 471, 478 (1945) citing Klinger v. Missouri (citations omitted), the court explained the rule: "[I]f the independent ground was not a substantial or sufficient one, 'it will be presumed (emphasis added) that the State court based its judgment on ... the Federal Question.'"

C. THE FLORIDA SUPREME COURT DECIDED THE FEDERAL QUESTIONS PRESENTED BY THE APPELLANT BELOW

The Appellee contends that the Florida Supreme Court's ruling in Ivory v. Wainwright, 393 So. 2d 542, (Fla. 1980) did not decide the federal questions raised by the Appellants. To support this contention, the Appellees note that the Florida Supreme Court cited both federal and state case law in discussing the Appellants' ex post facto claim. Motion of the Appellee at 20. First, the Appellee ignored the federal case cited by the Florida Supreme Court, Fleming v. Nestor, 363 U.S. 603 (1960). (Termination of an alien's social security benefits upon deportation did not violate the federal constitutional prohibition against ex post facto laws). The Appellees then argued that the Florida

1 The Appellees admit that if the federal question was raised in the Florida Supreme Court, the Florida Constitution would not be an adequate state ground for upholding Florida Statute §944.485. Motion of the Appellee at 25.

Supreme Court's citation, Zarsky v. State, 300 So.2d 261 (Fla. 1974) was proof that the Florida Supreme Court relied only on the Florida Constitution in validating Florida Statute §944.485. Motion of the Appellees at 20-21.

Tracking Zarsky backwards the Appellees admitted that Zarsky cited Cross v. State, 119 So. 380 (1928), wherein the Florida Supreme Court considered whether the statute under attack in that case was an ex post facto law under both (emphasis added) the state and federal constitutions. The Appellees then pretended that the citation of Cross within Zarsky is irrelevant because Cross decided the federal and state constitutionality of the statute separately. Motion of Appellee at 21. To the contrary, the two-step decision making in Cross, shows that not only was a federal question involved in Cross but more importantly that the Florida Supreme Court must have first passed judgment on the federal question before ruling the Florida Statute constitutional. In other words, the federal question was necessarily involved in the decision. Accordingly, the Florida Supreme Court's mention of Zarsky which in turn cites to Cross is evident that federal case law was cited for a reason: that to determine the constitutionality of Florida Statute §944.485 under the Florida Constitution, the Florida Supreme Court must have first decided the federal question raised by the Appellants'brief.

The Appellees also say that the Florida Supreme Court did not decide federal question regarding the Appellants' due process rights because the Florida Supreme Court in Ivory v. Wainwright, supra, cited both state and federal case law. Motion of Appellee at 21-22. The Appellees skipped over the federal decision, Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979) (a reasonable entitlement to due process is not created when a state provides the possibility of parole). The

Appellees say that the Florida Supreme Court's citation of Moore v. Florida Probation and Parole Commission, 289 So.2d 719 (Fla. 1974) "without citing to any specific authority, (emphasis added) held that there was no absolute right to parole." Motion of the Appellee at 22. The Appellees ignored the specific authority that the Florida court in Moore used to reach this determination. The court said:

> While there is no absolute right to parole there is a right to proper consideration for parole. This should be free from consequences of a conviction not meeting the standards of Gideon v. Wainwright, 372 U.S. 335 (1963); Burgett v. Texas, 389 U.S. 109 (1967). The Parole Commission is required to comply with constitutional (emphasis added) requirements - it cannot deny parole upon illegal grounds or upon improper considerations.
>
> Moore v. Florida Parole and Probation Commission, 289 So.2d at 720.

Accordingly, it is evident that in citing Moore the Florida Supreme Court in Ivory decided that Florida Statute §944.485 was valid under the Florida Constitution only after first deciding that it withstood muster under the federal constitution.

The Appellees then cite Minnesota v. National Tea Company, 309 U.S. 551, 556 (1940); and Levy v. Superior Court, 167 U.S. 175, 177-78 (1897) for the proposition that this Court "has refused to regard as dispositive the fact that a state court cited federal constitutional cases." Motion of Appellee at 23.

In Minnesota, this Court refused to dismiss the appeal when "there is a strong indication, as here, that the federal constitution as judicially construed controlled the decision below." 309 U.S. at 556. As in the instant case, there is also a strong indication that the federal constitution controls the Florida court's decision; as the Appellee points out, there is no adequate state ground for upholding F.S. §944.485 if the federal constitu-

tional challenges were properly presented. Motion of the Appellee at 25.

Accordingly, as in the instant case, when it appears that the Florida Supreme Court's decision was based on federal and state grounds, and the state grounds are insufficient to sustain judgment, this Court has assumed jurisdiction. See Johnson v. Risk, 137 U.S. 300 (1890); Abie State Bank v. Bryan, 282 U.S. 765 (1931); Williams v. Kaiser, 323 U.S. 471 (1945).

The Appellee also cites Levy v. Superior Court, 167 U.S. 175, 177-78 (1897), for the same proposition; that the Florida Supreme Court cited federal case law in the instant case only as persuasive authority for interpreting the state constitution. Motion of the Appellee at 22-23. In Levy, the state statute was attacked in state court on the grounds that it violated the state constitution and not that it was repugnant to the federal constitution. In the instant case, however, the Appellants consistently argued that Florida Statute 944.485 violated the federal constitution. Accordingly, the Levy analysis is not dispositive in the case at bar.

The Appellees also cite Durley v. Mayo, 351 U.S. 277, 281 (1956) for the proposition that if the grounds for the decision by the state court are unclear, the Appellant must affirmatively show that jurisdiction exists. Motion of the Appellee at 25. But in Durley, the lack of clarity resulted from the highest state court issuing no opinion, unlike the case at bar where the Florida Supreme Court cited both state and federal cases. Accordingly, the Durley standard for clarity is inapplicable in the instant case.

D. THE FEDERAL QUESTION OF DISCLOSURAL PRIVACY IS SUBSTANTIAL

The Appellee contends the only federal constitutional question properly presented by the Appellantsis insubstantial: that Florida Statute §944.485 violates the Appellants' right of privacy. To support this contention the Appellee baldly cites Rule 16.1(b), (d), Rules of the United States Supreme Court without any supporting authority. Motion of the Appellee at 29-30.

Guidelines as to when this Court has refused jurisdiction because a state court judgment presents no substantial federal question are general. But in Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311 (1902), this Court listed two circumstances under which a federal question is considered insubstantial: First, when the federal question is "so absolutely devoid of merit (emphasis added) as to be frivolous;" or second, where the question has been "so explicitly (emphasis added) foreclosed by a decision or decisions of this Court as to leave no room for real controversy."

In Milheim v. Moffat Tunnel Improvement District, 262 U.S. 710, 716-17 (1923), this Court stated the rule for determining whether a question is frivolous. Said the Court: "[Where] [t]he federal question presented ... requires analysis and exposition for its decision, [it] is not frivolous." Because this Court has construed the federal constitution to protect certain privacy interests and Florida Statute §944.485 requires all prisoners to disclose all assets and revenues to the state of Florida on a regular basis or forfeit illegibility for parole, the federal question disclosural privacy is neither utterly without foundation nor frivolous.

As to the second standard by which this Court judges whether the federal question raised is substantial, this Court looks to whether the federal question has been "so explicitly (emphasis added) foreclosed by a decision or decisions of this

Court as to leave no room for real controversy." Equitable Life Assurance Society v. Brown, 187 U.S. at 311. See Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 290 (1952); Patterson v. Stanolind Oil and Gas Company, 305 U.S. 376 (1939).

Disclosural privacy has only been explicitly mentioned by this Court in two cases: Whalen v. Roe, 429 U.S. 589 (1977) and Nixon v. Administrator of General Services, 433 U.S. 425 (1977). Accordingly, this interest is the newest and least defined. As recognized by the Fifth Circuit in Plante v. Gonzales, 575 F.2d 1119 (1978), this Court has provided little specific guidance on this aspect of the right of privacy and therefore neither Whalen nor Nixon resolve the question here presented. See Shevin v. Byron, Harless, Shaffer, Reid and Associates, 379 So.2d 633 (Fla. 1980). Accordingly, the federal question of disclosural privacy presented in the instant case has not been explicitly foreclosed by a decision of this Court and is therefore a substantial federal question.

The Appellees also make a substative argument in their motion before this Court; the Appellee alleges that because this Court has not held that the federal constitutional right of privacy absolutely precludes governmental dissemination of private matters, that the Appellants' privacy claim is without merit. Motion of the Appellee at 34.

To support this contention, the Appellee cites Nixon v. Administrator of General Services, 433 U.S. 425 (1977) and Whalen v. Roe, 429 U.S. 589 (1977).

In Nixon, this Court upheld the Presidential Recordings and Materials Preservation Act, 44 U.S.C.S. §2107 because of the numerous safeguards that protected the former President's constitutional right to privacy. Among the safeguards were: (1) the limited intrusion of the screening process; (2) Mr. Nixon's

status as a public figure; (3) the lack of any expectation of privacy in the overwhelming majority of the materials; (4) the important public interest in preserving the materials; (5) the Act's sensitivity to Mr. Nixon's legitimate private interests; (6) the virtual impossibility to segregating the small quantity of private materials without comprehensive screening; (7) the likelihood that regulations to be promulgated by the Administration will further moot Mr. Nixon's fears that his materials will be viewed by a number of persons.

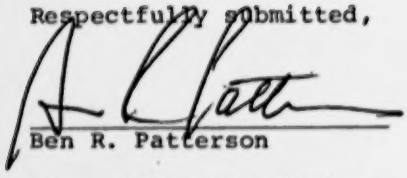
It is clear that none of the aforementioned safeguards are present in Florida Statute §944.485. For example, not only is the intrusion substantial, but the Appellants have a reasonable expectation of privacy with regard to their financial records. See Katz v. United States, 389 U.S. 347 (1967). Additionally, the Appellant is a private, not a public person, and the statute is insensitive to the Appellants' legitimate private interests. And there is no likelihood that further regulations will be promulgated to lessen the Appellants' fears that the very private financial records will not be seen by a host of persons.

In sum, Florida Statute §944.485 accomplishes its ends by a means calculated to be as intrusive as possible.

As this Court held in Roe v. Wade, 410 U.S. 113 (1973), where fundamental rights such as the right of privacy are involved, any state regulation may be justified only by a compelling state interest and must be narrowly drawn.

Accordingly, for the reasons enumerated above, Florida Statute §944.485 does not meet these standards and is therefore a deprivation of the Appellants' federal constitutional right to privacy.

Respectfully submitted,



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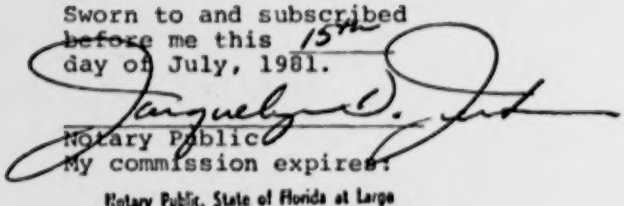
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing jurisdictional statement has been served upon each of the named Appellees, Louis L. Wainwright and Paul Murchek, through their counsel the Attorney General of Florida by mailing the same by first class United States mail to Jim Smith, Florida Attorney General, and to Lucy H. Harris, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 15th day of July, 1981.

Ben R. Patterson

Sworn to and subscribed
before me this 15th
day of July, 1981.



Notary Public
My commission expires:

Notary Public, State of Florida at Large
My Commission Expires Jan. 24, 1982
Bonded by American Fire & Casualty Company